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E. R. Callister; Walter L. Budge; Wallace B. Kelly;

Recommended Citation

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In the
Supreme Court of the State of Utah

STATE OF UTAH, by and through
its Road Commission, H. J. COR-
LEISSEN, Chairman, LAYTON
MAXFIELD and LORENZO J.
BOTT, members of the State Road
Commission,

Plaintiff and Appellant,

vs.

BRACK HOWARD NOBLE and
ANN C. NOBLE, his wife,
Defendants and Respondents.

Case No.
8884

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This Court is no stranger to this cause, *State of Utah, by and through its Road Commission, et al. v. Brack Howard Noble, et al.*, 6 Utah 2d 40, 305 P.2d 495. That case remanded a former jury award of \$150,000.00 for 8.1 acres of land together with interest thereon for

defendants' mineral bearing land, home and businesses taken for the construction of a state highway.

The cause has been retried to a jury in the Third Judicial Court and verdict returned in the sum of \$175,000.00, together with interest thereon in the further sum of \$28,520.98. The Court below, Hon. Stewart M. Hanson, J., on motion for new trial, ordered:

That the defendants offer to remit the sum of \$35,000.00 within ten days hereof, to the plaintiff, from the total judgment rendered in the sum of \$175,000.00, making a total amount defendants are to receive for the property involved the sum of \$140,000.00 with interest at 6% from July 22, 1955. It is further ordered that *if the offer of remission is not made within the time specified, the Court grants motion for a new trial and if the plaintiff refuses to accept defendants' offer of remission, motion for new trial is denied.* (Emphasis added). (R. 57).

The defendant offered to remit. The plaintiff refused to accept the remittitur and elected to bring this appeal based upon the former decision of this Court, *State v. Noble*, supra.

STATEMENT OF FACTS

Defendants read into the record the testimony of Albert Z. Richards, Civil Engineer, from the former trial wherein he concluded there were 1,299,868 tons of material in the tract, of which 355,222 tons was "muck"

sand and 944,646 tons were mixed sand and gravel. Plaintiff objected as follows:

MR. BUDGE: At this point, Your Honor, I wish to interpose an objection. This witness has testified as to the quantity. I submit it is proper in this lawsuit to apprise the jury of the fact that there are gravel materials laying beneath the surface of this ground, that I think it is entirely *improper to advise the jury as to quantity*, because we can't reach the fair market price by separately evaluating the value of the ground and the gravel. I would like that objection, Your Honor. (Tr. 18, 19). (Emphasis added).

The Court overruled the objection. (Tr. 19).

Defendants read into the record the testimony at the previous trial of Don R. Bass, driller.

Defendants called as a witness Brack Howard Noble; the record shows:

Q. Now at that time will you relate the prevailing price that was being paid to you and in that area for sand which was loaded by the purchaser?

A. On the premises?

Q. On the premises?

MR. BUDGE: Objection Your Honor on the same grounds as the original objection that you can't establish a fair market value in this manner, by setting up the price on gravel and the amount. I make my objection.

THE COURT: The objection at this time will be sustained. We will go into another question

Governor Maw. *At this time the objection is sustained.* (Emphasis added)

Q. (By Mr. Maw) Will you describe to the Court the manner in which operators purchased sand and gravel similar to, in that area similar to what you were selling. What methods did you have of selling?

A. What method did I have of selling it?

Q. What was the prevailing methods of disposing of sand and gravel?

A. In that area?

Q. Yes?

A. Well, there was an operator just north of me that was selling sand, loading it out. He would load it himself. Some of the people in the area would bring their own equipment in and load it out, and it depended on who the contractor was, who you sold it to or who the buyer was, in other words, as to whether he wanted it loaded or he wanted someone else to load it for him.

Q. Will you state to the Court and jury, do you know the prevailing value of sand in place similar to yours in that area at that time?

MR. BUDGE: Same objection, Your Honor.

THE COURT: *The objection is overruled.* (Emphasis added)

A. In place it would be about twenty to twenty-five cents a yard at that time.

Q. (By Mr. Maw) Now explain that a little more in detail?

A. Well—

Q. And describe the things that went to your rating—

MR. BUDGE: The question is leading.

Q. (By Mr. Maw) — a load?

MR. BUDGE: The question is leading and suggestive and I object to it.

Q. (By Mr. Maw) Will you explain what you mean by twenty to twenty-five cents a yard in place?

A. Yes sir. In place about twenty cents a yard if they had any clearing or screening to do; twenty-five cents a yard if they had to just load it. And mine was ready to load and in fact I sold a lot where they loaded it and it didn't require any screening.

MR. BUDGE: I object to that.

MR. MAW: Just answer the questions.

MR. BUDGE: It is volunteering.

MR. MAW: Just answer the questions as I give them to you.

Q. (By Mr. Maw) The prevailing price for sand and gravel similar to yours was twenty to twenty-five cents a yard in place?

A. In place.

(Tr. 77-79).

The witness testified further:

Q. Now are you acquainted with the prevailing price in your area at that time, July 22nd., 1955, of sand and gravel mix similar to what you had on your own property?

A. In place?

Q. In place.

MR. BUDGE: Same objection.

THE COURT: Same ruling. Objection overruled.

A. In place is about fifteen cents a yard, a ton.

Q. (By Mr. Maw) The prevailing price at that time, state it again?

A. Fifteen cents a ton.

(Tr. 84, 85).

And further, over plaintiff's objection:

Q. Sand is \$1.10 a yard at the prevailing price?

A. Yes.

(Tr. 86).

Later in the proceedings (Tr. 252), plaintiff recalled Mr. Noble under the rule as an adverse witness. Noble testified as follows:

BY MR. BUDGE:

Q. Mr. Noble you are the owner of the tract of land which we are discussing, and you have testified previously in this case, is that correct?

A. Yes sir.

Q. As I recall you told the jury in Court yesterday or the day before when you were on the witness stand that you considered a fair market value of this property to be \$300,000.00?

A. Yes sir.

Q. Now Mr. Noble I wish you would tell the jury how you arrived at that figure of \$300,000.00?

A. All right sir. 355,222 yards of sand and gravel.

Q. Let's just go a little bit slower. 355,000?

A. Yes sir. Tons of gravel, tons of sand, 355,222 tons of gravel, or sand, pardon me.

Q. Yes sir.

A. At eighty cents a yard is \$284,177.60. It would cost less—

Q. Eighty cents a yard did you say?

A. Yes sir.

Q. I see.

A. It would cost less than twenty cents to produce it. That would leave—that would cost at twenty cents a yard would be \$71,044.40. That would leave a net on the sand alone of \$213,133.20, on the sand alone.

Q. Let's read it a little slower. \$213,000.00?

A. Yes.

Q. What is the rest of your figure?

A. \$213,133.20.

Q. That would be your net on the sand?

A. Yes.

Q. I see.

A. On the sand alone.

Now on the gravel there was 944,646 tons.

Q. Yes sir.

A. That at eighty cents a ton, that would be \$755,716.80.

Q. I see.

A. And to produce that it would cost forty cents a yard the way I figure it. An expert on it out there might figure it less than that, but I figure it—

Q. Just tell us how you figure it.

A. That would cost to produce \$377,855.40. That would leave a net profit on the sand and gravel—

THE COURT: Mr. Noble, this young lady here, I have got to have her for a few years, and if you talk so fast she is going to be written out.

A. (continuing) The cost was \$377,855.40. That would leave a net profit on the sand and gravel of \$377,858.40.

Now my frontage.

Q. (By Mr. Budge) Now let's add those two up. You have got a net on your gravel of \$377,858.40, and you have a net on your sand of \$213,133.20, is that right?

A. Yes sir. That is the combination profits on the sand and gravel, on the sand and sand and gravel alone in the pit of \$590,991.60.

Q. \$590,991.00?

A. And sixty cents.

Q. And sixty cents. That is the way you have computed the value of your property?

A. That is right.

Q. All right.

A. I figure anybody would be willing to pay \$300,000.00 when they can get that much on the sand and gravel alone and still have the frontage left.

Q. Let me ask you the question.

A. You ask me the question.

Q. I want to know why you figure that somebody would pay \$300,000.00 for that?

A. All right. When they can get that much alone on the sand and gravel and still have the frontage left they ought to be willing to pay that.

Q. How long, Mr. Noble, would it take them to get that?

A. I imagine they could do it, if they wanted to, to get it in three years at least, or maybe sooner.

Q. In three years?

A. Mark Schoenfeld sold 200,000 yards the last month.

Q. That was last month. I am talking about 1955.

A. That would be the period that I just stated.

Q. How much did you sell in 1954?

A. I don't remember, but I sold \$5,600.00 worth in 1955 before I was thrown out of there in July.

Q. It is entirely speculative as to what you could sell; it was at that time?

A. I wouldnt say so.

Q. And it is today?

A. That was the closest sand and gravel of that kind of material to all the hot plants.

Q. And do you know whether or not it might be possible, within the realm of speculation,

that is an adequate period upon which to figure it? Do you know?

A. Now, that is right. If they burned up the place I might not have made it, but otherwise I certainly would have made it.

Q. Now you go ahead and tell us the rest of how you speculated on your \$300,000.00?

A. That still left the frontage and the house and what not. That was just speaking of the sand alone. That would not disturb the frontage, etc.

I had that figured out at \$59,000.00 for the frontage at \$100.00 a front foot. The way I arrived at that figure the land just across the street sold there for \$150.00 a front foot, and we have a photostatic copy of that here.

And then I figured the buildings along with Howa there and took his figures on them at around \$40,000.00. That would make—

THE COURT: Slow that machine down just a little Mr. Noble.

Q. (By Mr. Budge) You took Mr. Howa's figures on the buildings?

A. And the installations.

Q. How much of that \$40,000.00—

A. That was a little less than what he figured, but that was figuring a little depreciation.

Q. I didn't hear what you said?

A. \$40,000.00.

Q. What else?

A. That was a little less than what he had it.

Q. You were being big hearted?

A. That is all right.

Q. I don't mind your telling the jury that.
Now how much—

A. That would be—let's see, I would have
to add those two figures together. 59.5—

Q. Would be \$99,000.00.

A. And five hundred, yes.

Q. \$99,500.00?

A. Yes.

Q. Now you have got a valuation out there
of \$690,491.60 as a total?

(Tr. 252-256).

Plaintiff then made the following motion:

MR. BUDGE: I ask this witness' testimony
be stricken and the jury be informed to give it
no weight because it is in contravention of and
distinctly against the opinion of the Supreme
Court of the State of Utah. It is not admissible,
it is valueless under that decision.

(Tr. 256, 257).

The Court took the motion under advisement. (Tr.
257). The Court overruled the motion. (Tr. 271).

Returning to defendants' case. Defendants called
Joseph P. Howa, Civil Engineer, who testified on voir-
dire that:

MR. BUDGE: Are you a land appraiser?

THE WITNESS: No sir.

MR. BUDGE: Are you a gravel appraiser?

THE WITNESS: No sir.

(Tr. 115).

The Court overruled plaintiff's objection as to the qualification of the witness as an expert. (Tr. 115, 116, 117). The witness was asked the following questions and over the objection responded as follows:

Q. All right. Now basing your conclusions on the information that you have received through your investigations on the value of the properties for business purposes, and your experience and knowledge with respect to the *price* of sand and gravel as of July 22nd, 1955, of your own investigations of the property and your own appraisals of the buildings on the property, and of the business on the property, do you have an estimate as to the total value of the whole tract of land, the 8.1 acres of land which is the subject of this lawsuit? (Emphasis added)

MR. BUDGE: Answer yes or no.

Q. (By Mr. Maw) Do you have an opinion as to its value?

A. Yes sir.

Q. Can you state that opinion?

MR. BUDGE: Now if Your Honor please I have an objection. First it is based on hearsay. Second it is merely a conclusion of the witness. Third the witness has not been qualified to testify as to real estate values.

THE COURT: Well with the statement that I think it goes to the weight of his testimony rather than his competency why the objection is overruled.

Q. (By Mr. Maw) Will you state what you consider the value of the whole tract to be?

A. I think that the whole thing was worth \$270,000.00 to \$275,000.00.

(Tr. 130, 131).

Defendants' called Mark L. Schoenfeld, Gravel Operator and also a witness in the former trial. Schoenfeld testified as to market price for sand and gravel (Tr. 142-144); as to the supply of fine sand—"almost diminished;" (Tr. 141 as to quantities of sand and gravel on the Noble property (Tr. 153); as to the market value of — \$275,000.00 (Tr. 155). All over plaintiff's objection.

Thomas E. Gaddis, testifying for the defendants as an expert witness said:

A. The sand and gravel based on Mr. Richards' testimony was 1,299,800. In round numbers 1,300,000 tons of sand and gravel. And based on information I could find from interviewing practically a great many of the sand and gravel people including some of your witnesses and some people that were in here I believe that the total value of the property is around \$291,000.00.

(Tr. 172).

S. D. Rideout, defendants' further expert, testified:

A. In arriving at the value of the sand and gravel I relied on the report of Mr. Richards as to the quantity and the quality. I relied on the information we got by interviewing—

Q. By what?

A. By interviewing and calling at the different gravel pits in Davis County and in Salt Lake County and in talking with the owners, finding out the prices at which they were selling gravel and sand.

(Tr. 188).

And,

* * *

So based on that and going over it from the different angles and in determining that and for the business that Mr. Noble had already built there in the way of antique business and trailer court business, how much you might get out of that and how much he was getting each year additional, but forgetting that entirely, I base the value between 260 and \$270,000.00 as a fair market value for that property at a price that I would be very happy to have it listed and offer and advertise it for sale.

(Tr. 190).

The defendant had one further witness who was called for the purpose of testifying as to the supply and demand of and for gravel in the area.

The plaintiff called, in addition to Brack Howard Noble, two expert witnesses, C. Francis Solomon, Jr., and Werner Kiepe. These witnesses explained to the jury as to what they considered in arriving at their opinion as to fair market value of the land taken, including the mineral deposit, but *they did not testify on direct examination as to quantity or the price of sand and gravel.*

Argument of counsel to the jury is reported. (Tr. 275-308). We draw to the Court's attention certain portions thereof which are indicative of defendants' presentation of their cause.

Mr. Fadel:

* * *

Now we come to the sand and gravel operation, and that is the one where we have the greatest difference among the witnesses. In determining what there is in the way of sand and gravel, first we want to consider the amount, what there is there, and then we want to consider the kind of material that is there, and we want to consider whether there is a demand or a market for it and the price.

(Tr. 278).

And,

* * *

Now, Mr. Richards, in making his cross-sections, etc., has determined that there were 355,222 tons of sand and 944,646 tons of gravel, making a total of about 1,300,000 tons.

(Tr. 279).

Also:

* * *

Now as to price, Mr Noble testified earlier in his testimony that the prevailing price for sand in place was 25 cents a ton, that if it were delivered it would be \$1.10 a ton. The gravel, as to the prevailing price in place was 15 cents a ton, and that if it were delivered it would be \$1.00 a ton. And then when he was put on the stand by Mr. Budge he made the determination that the net he could get out of this many tons of sand, after allowing costs and some things, was \$213,000.00 for the sand alone, and from the gravel, after allow-

ing costs would be \$377,000.00, which would mean that a person coming along to buy that would hope to realize \$590,991.00 from the gravel and from the operation.

(Tr. 283).

Mr. Maw:

It would be foolish for me, or perhaps you, to buy it, but it would be advantageous for some big company or contractors that were engaged in the business.

All right. Now suppose the buyer is a contractor who bids on roads and needs materials in large abundance regularly. He has his trucks; he has his equipment; he has his bull dozers; he has all of these things which he handles materials with. And what is he going to think of? "I am going to buy where I don't have to pay what the prevailing price is when I go to a pit with my truck and for a load. I have got to make some sort of a profit by it."

(Tr. 299).

And,

Now, Mr. Richards said, "There is 1,299,868 tons. There might be some variance there; there may be rocks, things like that, we don't figure on, but I am within 10 percent right."

(Tr. 300).

Also,

Now, the same thing is true with respect to price. A half a dozen witnesses testified to the price of sand and gravel in a pit and sand in a pit. Now Mr. Schoenfeld has been in the business all of his life and he was operating next door to this property, and he said, "When a truck comes on my property to buy it we get 70 to 75 cents."

I think his figure was 75 cents, "a ton for it, and it costs 10 cents to load." He says, "I can hire it loaded for 10 cents a ton."

(Tr. 301).

Too,

Now the question that you have to answer is, to a contractor who is dealing with sand and gravel, how much is it worth in place if he can get it out and make money like that?"

Mr. Noble said he has figured it out on that basis, and a contractor could make, he could have made \$213,000.00 out of it. He testified he was going to go buy the equipment and was getting ready for it when the State condemned his property. He could have made \$213,000.00 out of the sand alone, and \$377,000.00 out of the gravel alone, making \$590,000.00—it was his prospect—from the sand and gravel alone. And besides that he has this big stretch of business property which would go up in value, naturally, as the business went out there. And he had a trailer camp that was three-fourths full. That would mean, all the time on an average, that would mean 24 occupants, all the time, which would net him—and you can figure out for yourselves what it would net. And the volume of his business on the antiques, he had it going.

Now, he says, "I don't think I am asking too much for my property if I can sell and for which the buyer can make over half a million dollars with the sand and gravel, and the buyer will have my business property and my business and my trailer camps and my home and everything else, I am not asking too much if I ask \$300,000.00 for it." Well, I don't think so either. I certainly don't think so.

Now, let me ask you, I don't know whether you are in a position to determine what a dealer in concrete would pay. It may not be a builder of roads. It may be an asphalt plant. They may build one there instead of where it is, where they would process it into asphalt and perhaps make a still bigger profit. But I do know this, that it is your responsibility to determine what is a fair price for the whole piece.

You may not be able to figure out too carefully what a willing buyer will pay for it, but I think that most of you can figure out what a willing seller would sell it for.

Now, you have got to think of Mr. Noble as a man who didn't have to sell it. Maybe he didn't want to. He didn't have to. But he figured if he can get a fair price for it he will sell it. Now, you just figure that you are the buyer. If you had that set-up where you knew that within a period, whether it is five or ten or fifteen years, or three years, you could make \$600,000.00 from your sand and gravel, if you figured that as Mr. Noble figured it, even if you were wrong in your figure, that is what in your mind that you could do with it, as experience taught him he could do with it, and if you had that kind of business property and you had these going concerns, and a trailer camp that was giving you security for the remainder of your life, would you, if you got an offer of \$57,000.00 for all of it, sell it?

(Tr. 302-304).

Finally,

Well, there is no—Now, let me tell you this. There is no evidence to the contrary that the price of sand in place, loaded on the truck, is 75 cents a ton, and the cost of loading it is 10 cents

a ton, and you are to decide this thing on what transpired on this stand. You have got to accept those figures because there were no figures to the contrary. So that is the basis upon which you would do your figuring.

(Tr. 306).

STATEMENT OF POINTS

POINT I.

THE VERDICT IS NOT SUPPORTED BY EVIDENCE.

ARGUMENT

POINT I.

THE VERDICT IS NOT SUPPORTED BY EVIDENCE.

This Court said in its former opinion, *State v. Noble*, 6 Utah 2d. 40, 305 P.2d 495:

Galley 6

Fixing the value of land in condemnation cases by finding the product of the number of tons of muck sand and sand and gravel in place multiplied by the price per ton is almost universally condemned. * * *

This court is *State v. Tedesco* observed:

* * *

“A condemnee is not entitled to realize a profit on his property. It must go to the condemnor for its fair market value, as is, irrespective of any claimed value based on an aggregate of values of individual lots in a subdivision which one hopes to sell at a future time to individuals rather than to an individual. * * *

As will be observed from the cases hereafter considered, the defendants are not entitled to the value of the sand and gravel independently of the land of which it is part, nor considered as merchandise. * * *

The test of market value is not an expert's estimate of what a buyer would pay per ton for sand and gravel multiplied by the total tons of each over a period of many years after the same has been removed from the land.

It is inconceivable that a willing buyer who was not required to purchase would pay for the land in question a price in cash that would require many years in disposing of the sand and gravel to recover back the full estimated purchase price if it were recoverable at all. * * *

No useful purpose would be served by re-stating here the authorities cited by this Court in its former opinion. We think we read that opinion correctly and our interpretation thereof is, that, it is not proper to arrive at a value of the land taken by multiplying the quantity of minerals beneath the surface by a price such minerals were currently bringing per yard.

We submit our cause subject to the opportunity to submit a reply brief if such be deemed advisable.

CONCLUSION

The verdict should be set aside and the cause remanded with instruction to the Court below to enter judgment for plaintiff in a sum supported by the evidence and not in excess of \$72,000.00, together with interest thereon.

Respectfully submitted,

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